

SUPPORTING DATA – SB 80 & SB 81

for presentation to the Montana Senate
By Senator Dan McGee – January 30, 2009

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1. Declaration of Independence:
 - a. ***“...Deriving their just powers from the Consent of the governed.”***
2. Black’s Law Dictionary:
 - a. **Constitution:** *“The organic and fundamental law of a nation or state...establishing the character and conception of its government...prescribing the extent and manner of the exercise of sovereign powers. A charter of government deriving its whole authority from the governed.”*
 - b. **Politics:** *“The Science of Government; the art or practice of administering public affairs.*
3. 1972 Montana Constitution
 - a. Article II, Section 1. Popular sovereignty.
“All political power is vested in and derived from the people. All government of right originates with the people, is founded upon their will only, and is instituted solely for the good of the whole.”
 - b. Article II, Section 2. Self-government.
“The people have the exclusive right of governing themselves as a free, sovereign, and independent state. They may alter or abolish the constitution and form of government whenever they deem it necessary.
 - c. Article III, Section 1. Separation of Powers.
The power of the government of this state is divided into three distinct branches – legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.
 - d. Article X, Section 8. School District trustees.
The supervision and control of schools in each school district shall be vested in a board of trustees to be elected as provided by law.
4. Article X, Section 9, Montana Constitution – definitions of Boards of Education & duties:
see handout

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5. 1992 First Judicial District Court Opinion – *see handout*
6. Issues with 1992 Court Opinion
 - a. Opines that BOPE has “constitutionally granted rule-making authority”
 - b. Opines that the Statute established by the Legislature:
 1. violates separation of powers
 2. is subordinate to the rule established by the BOPE.
7. Consequences of the Court’s Opinion:
 - a. BOPE’s rule overturns state law.
 - b. Establishes 4th branch of government
 - c. Grants legislative powers to an Executive Branch agency
 - d. Overturns clear intent of the Constitutional Convention -

Board members do not derive their political power from the people.

There is no check and balance to the actions of the BOPE.

The Court opinion has granted the BOPE complete autonomy status, a position unsupported by the clear intent of the framers of the Constitution and which violates every tenant of a Republican Democracy.

The BOPE has absolute, un-checked power to adopt rules or accreditation standards via their court-granted “quasi-legislative” powers of “rule-making”. These rules or accreditation standards then become the laws of education in Montana. Statutes passed by the Legislature, the duly elected representatives of the sovereign people, are totally subservient to the rules adopted by the BOPE.

The BOPE’s rules or accreditation standards are then dictates to local School Boards, which clearly have the constitutional authority for the supervision and control of the schools in their districts. This power of the BOPE abrogates and renders moot the legitimate, constitutionally-granted powers of the local school boards, whose members are duly elected by and through the sovereign powers of the people of Montana.

The Court’s ruling renders the Montana Legislature as the check-writer only - with no oversight over the BOPE’s actions, rulings, or expenditures.

- K – 12 budget for 2011 biennium = \$ 1,371,347,089.00
- Higher Ed budget for 2011 biennium = \$ 407,064,010.00
- Total proposed 2011 education budget = \$ 1,778,411,099.00

BOPE actions and members are not subject to elections, oversight, checks or balances by any other agency or entity of state government, nor by the sovereign people.

3/12/92

SHERLOCK
DECISION

CLARA GILREATH
CLERK OF DISTRICT COURT

MAR 12 4 07 PM '92

FILED
BY CINDY EVENSON
CLERK

MONTANA FIRST JUDICIAL DISTRICT COURT
COUNTY OF LEWIS AND CLARK

* * * * *

MONTANA BOARD OF PUBLIC EDUCATION,)

Petitioner,)

vs.)

MONTANA ADMINISTRATIVE CODE
COMMITTEE,)

Respondent.)

* * * * *

Cause No. BDV-91-1072

ORDER AND DECISION

This matter is before the Court on motions by all parties for summary judgment.

FACTUAL BACKGROUND

In 1989, the Board of Public Education (hereinafter the Board), adopted Rule 10.55.804, A.R.M. That rule, in pertinent part, provided as follows:

Beginning 7-1-92 the school shall make an identifiable effort to provide educational services to gifted and talented students, which are commensurate with their needs and foster a positive self-image.

The Administrative Code Committee felt that the aforementioned

BOPE
RULE

1 rule was in contravention of Section 20-7-902(1), MCA, which
2 provides:

3 A school district may identify gifted and
4 talented children and devise programs to
5 serve them." (emphasis added).

STATE
LAW

6 The Board would not change its rule. Thereafter, at
7 the request of the Administrative Code Committee, the 1991
8 legislature passed House Bill 116 which states as follows:

9 Whereas, the Legislature, not the
10 Executive Branch, is the lawmaking branch of
11 the state government under the Montana
12 Constitution; and

13 Whereas, the Legislature may delegate
14 its power to pass laws to the Executive
15 Branch, which may then, within certain
16 limits, adopt administrative rules that have
17 the force and effect of law; and

18 Whereas, a rule may not conflict with a
19 statute and is invalid if it does; and

20 Whereas, Section 20-7-902(1), MCA,
21 provides that "a school district may
22 identify gifted and talented children and
23 devise programs to serve them" and Rule
24 10.55.804 ARM mandates a gifted and talented
25 children program in each school, thereby
directly and clearly conflicting with the
statute; and Whereas, the Legislature has
made a gifted and talented children program
discretionary, at the choice of each local
school board, the Legislature nonetheless
affirms its support of gifted and talented
education and encourages local school
districts to identify gifted and talented
students and design and implement programs
that meet the needs of those students.

Be it enacted by the legislature of the
State of Montana:

*Legislature
Repealed
the Rule*

Section 1. Repealer. Rule 10.55.804,
ARM, is repealed.

Section 2 Effective Date. This Act is
effective July 1, 1991.

The Board felt that it had the authority to promulgate
the aforementioned rule pursuant to the Article X, Section
9(3)(a), of the Montana Constitution of 1972, which provides:

There is a board of public education to
exercise general supervision over the public
school system and such other public educa-
tional institutions as may be assigned by
law. Other duties of the board shall be
provided by law.

The Board brought the instant declaratory judgment
action seeking a ruling as follows:

1. The legislative branch is not the
sole law-making, or rule-making body under
the Montana Constitution. Rather, the Board
of Public Education, in exercising its Art.
X Sec. 9(3) powers of "general supervision"
has constitutional rule-making authority.
This provision is self-executing and the
authority granted is independent of any
power that is "delegated" to the Board by
the legislature.

*4th
branch of
govt w/
legislative
powers*

2. The Board's accreditation stan-
dards, including the rule mandating gifted
and talented programs, are within the
purview of its Art. X Sec. 9(3), constitu-
tional powers of "general supervision".

*rule making
authority*

3. That House Bill 116 and/or 20-7-902
MCA, to the extent they interfere or con-
flict with the Board's constitutional rule-
making are in violation of the separation of
powers doctrine of Art. III Sec. 1 of the
Montana Constitution and are therefore
invalid and of no legal effect.

*Separation-
of powers*

1 here have a situation where the Montana legislature is
2 interferring with the rule-making authority of a constitu-
3 tionally created Board of Education. This being the case, that
4 statutory interference is unconstitutional.

5 The Montana Constitution provides:

6 The power of the government of this state is
7 divided into three distinct branches--
8 legislative, executive, and judicial. No
9 person or persons charged with the exercise
10 of power properly belonging to one branch
11 shall exercise any power properly belonging
12 to either of the others, except as in this
13 constitution expressly directed or
14 permitted.

15 See Montana Constitution, Art. III, sec. 1.

16 This Court is cognizant of the fact that there must be
17 balancing between the powers of the legislature and those of
18 special boards created by Montana's Constitution. This bal-
19 ancing was discussed in detail in the case of Board of Regents
20 vs. Judge, 168 Mont. 433, 543 P.2d 1323 (1975). However, in
21 this case, this Court is convinced that the rule here in
22 question, as adopted by the Board, is well within its constitu-
23 tional prerogative to exercise general supervision over the
24 public school system.

25 In its brief, the State of Montana has delved
extensively into comments made by delegates to the 1972
constitutional convention. However, if the language of the
Constitution is clear, it may not be ignored. Further, if the

Local
School Boards

Court
ignores the comments
of the constitutional
delegates

1 language is clear, its meaning is to be ascertained from the
2 Constitution itself construing the language as written. This
3 being the case, there is no occasion for construction since the
4 language is plain and unambiguous. See General Agriculture
5 Corporation v. Moore, 166 Mont. 510, 516, 534 P.2d 859 (1975).

6 Further, the State notes that the rule, as originally
7 suggested by the Board, was allegedly drafted pursuant to
8 statutory authority and not pursuant to the Constitution. Thus,
9 argues the State, the Board cannot now seek to use the
10 Constitution to support the passage of the rule. With this
11 contention this Court cannot agree. The Board is a constitu-
12 tionally recognized and created agency. As such, it is not
13 subject to the usual administrative and legislative constraints
14 to which the State refers. For example, it matters not that the
15 Board may or may not have precisely complied with the Montana
16 Administrative Procedure Act in adopting the rule in question.
17 That Act is enacted by the legislature. As noted earlier, the
18 legislature cannot interfere with other constitutionally created
19 bodies that are properly conducting their business.

20 Further, the State points to the Attorney General's
21 opinion contained at 44 Op. Att'y Gen. No. 4. However, that
22 opinion expressly indicated that it was not dealing with any
23 constitutional power of the Board.

24 The State exalts form over substance and would require
25

1 the Board to perform a meaningless act. The State seems to be
2 contending that one of the reasons this rule is invalid is that
3 the Board did not follow precise administrative procedures.
4 Thus, argues the Board, if the Board did follow these precise
5 administrative procedures, and indicated that the rule was not
6 being adopted pursuant to a statute but pursuant to the Consti-
7 tution, then perhaps the rule would be valid. This Court
8 considers such a procedure to be a futile act. This Court will
9 not require the Board to go through such a futile procedure.
10 Perhaps that argument would be well taken if we were here
11 dealing with a board or agency created by another branch of
12 government. However, we are dealing with a constitutionally-
13 empowered board.

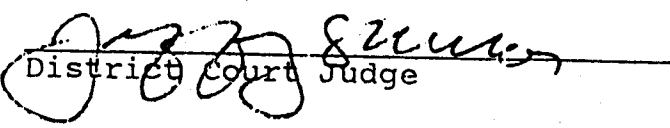
14 Based on the above, the Court hereby enters its
15 declaratory ruling as follows:

16 The Board of Public Education, pursuant to Article X,
17 Section 9(3), of the Montana Constitution, is vested with
18 constitutional rule-making authority. This provision is self-
19 executing and independent of any power that is delegated to the
20 Board by the legislature. The Board's rule mandating gifted and
21 talented programs is within the purview of the Board's constitu-
22 tional power of general supervision pursuant to Article X,
23 Section 9(3), of the Montana Constitution. House Bill 116, to
24 the extent that it interferes or conflicts with the Board's
25

Reverse of the
Trust

1 constitutional rule-making power, is in violation of the
2 separation of powers doctrine of Article III, Section 1, of the
3 Montana Constitution, and is therefore invalid and of no further
4 force or effect.

5 DATED this 12 day of March, 1992.

6
7
8 
District Court Judge

9 pc: W. William Leaphart
10 Eddy McClure
Judy Browning

11 PublicEd.o&d

12 k

13
14 - This establishes the 4th branch
15 of Gov't. thus negating Art. III,
16 Sec. 1 - 3 Branches

17
18
19 - This Court erred in that it
20 did not consider the "clear"
21 language in light of other provisions
22 of the Constitution -

23
24 - Separation of Powers

- Local School Boards that
are elected

Section 6. Aid prohibited to sectarian schools. (1) The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination. (2) This section shall not apply to funds from federal sources provided to the state for the express purpose of distribution to non-public education.

Section 7. Nondiscrimination in education. No religious or partisan test or qualification shall be required of any teacher or student as a condition of admission into any public educational institution. Attendance shall not be required at any religious service. No sectarian tenets shall be advocated in any public educational institution of the state. No person shall be refused admission to any public educational institution on account of sex, race, creed, religion, political beliefs, or national origin.

Section 8. School district trustees. The supervision and control of schools in each school district shall be vested in a board of trustees to be elected as provided by law.

Section 9. Boards of education. (1) There is a state board of education composed of the board of regents of higher education and the board of public education. It is responsible for long-range planning, and for coordinating and evaluating policies and programs for the state's educational systems. It shall submit unified budget requests. A tie vote at any meeting may be broken by the governor, who is an ex officio member of each component board.

(2) (a) The government and control of the Montana university system is vested in a board of regents of higher education which shall have full power, responsibility, and authority to supervise, coordinate, manage and control the Montana university system and shall supervise and coordinate other public educational institutions assigned by law.

(b) The board consists of seven members appointed by the governor, and confirmed by the senate, to overlapping terms, as provided by law. The governor and superintendent of public instruction are ex officio non-voting members of the board.

(c) The board shall appoint a commissioner of higher education and prescribe his term and duties.

(d) The funds and appropriations under the control of the board of regents are subject to the same audit provisions as are all other state funds.

(3) (a) There is a board of public education to exercise general supervision over the public school system and such other public educational institutions as may be assigned by law. Other duties of the board shall be provided by law.

(b) The board consists of seven members appointed by the governor, and confirmed by the senate, to overlapping terms as provided by law. The governor, commissioner of higher education and state superintendent of public instruction shall be ex officio non-voting members of the board.

Section 10. State university funds. The funds of the Montana university system and of all other state institutions of learning, from whatever source accruing, shall forever remain inviolate and sacred to the purpose for which they were dedicated. The various funds shall be respectively invested under such regulations as may be provided by law, and shall be guaranteed by the state against loss or diversion. The interest from such invested funds, together with the rent from leased lands or properties, shall be devoted to the maintenance and perpetuation of the respective institutions.

Section 11. Public land trust, disposition. (1) All lands of the state that have been or may be granted by congress, or acquired by gift or grant or devise from any person or corporation, shall be public lands of the state. They shall be held in trust for the people, to be disposed of as hereafter provided, for the respective purposes for which they have been or may be granted, donated or devised.

(2) No such land or any estate or interest therein shall ever be disposed of except in pursuance of general laws providing for such disposition, or until the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the state.

(3) No land which the state holds by grant from the United States which prescribes the manner of disposal and minimum price shall be disposed of except in the

BOE

BHE

BPE

any education. The state administers over 25 major federal programs in education at this level. The kinds of education needed and offered are constantly changing and expanding. A board which is to cope adequately with this vast area of responsibilities must consist of members who are qualified and who have sufficient time to become knowledgeable about the particular problems and issues of public education. A board is no more capable than is a Superintendent of being competent to administer two fundamentally different areas of education. Now, another problem that's arising here, and I'm sure that if you've been reading the papers and you look at the Serrano thing and so forth, it's very, very obvious that we're going to get more federal funding. Now, there have been two studies on this. The commission—the presidential commission that was issued—the report that was issued last Monday said that we're going to get, at a minimum, 21 percent of federal funding—21 percent. Now, another intergovernmental commission that issued a report in January, a presidential commission, said that these grants will be conditional on matching or more funds. Now, if that's true—now, presently we're getting 70—7 percent federal funding. If we're going to have 21 percent federal funding, that means, then, that the state government is going to be putting in 21 percent; that gives you 42 percent. Presently the state government is putting in 27 percent. You're talking about 69 percent state and federal funding—69 percent. Now, it is my estimation from all that I know, and I'm sure that some of the members of the Revenue and Finance Committee will agree with this, since they have studied extensively, that that figure is going to be an absolute minimum. It is probably way too low. What I'm saying here, then, is that we're talking probably about anywhere from 80 to 85 percent federal and state funding that's coming, and we might as well face it. Now, with all of that money flowing through the state, don't you think we need another board to be looking at it—a board of lay people watching over this, having a check on the State Superintendent's office, and so forth? The need for a separate board for public education promises, then, to become even greater in the future. The present trends indicate the assumption of much greater role in educational financing by state and federal, possibly as much as 90 percent—and I don't want to go into that, because this is according to Serrano, and there's a variance factor there that—constitutional lawyers say there's somewhere between 10 and 12 percent, but we don't know. Well, a well-informed and representative board would provide a much-needed balance to decisions on administrative pol-

icies, and that is one of the things I want to emphasize. In this whole business of the boards, we have to keep in mind all the time that the Legislature is not going to be here in session all the time, that the representatives of the people are not going to be here administering this. And the greatest fear is the bureaucracy; the greatest fear is the bureaucracy. A large majority of witnesses who testified on the subject, including key state officials and many educators, spoke in favor of the two-board concept. As a matter of fact, every major person involved in education, like the State Superintendent of Public Instruction, the Presidents of all the University Systems, community—the university units—the community college presidents, the Montana Education Association, the largest education association in the state, and many, many other groups totally support this two-board concept. Three major studies that have been made since 1958—the Durham Report, the Peabody Report, and the Legislative Council study of 1958—all of them support the two-board concept. Not only that, at one time we had a constitutional amendment brought out—I believe it was in 1960; three of them were brought out—they were never put on the ballot, because they weren't signed by the Governor. It had nothing to do with the two-board concept. The longest-serving member of the State Board of Education, Maury Richards—many of you know him—sent us a letter, and I quote: "Please give every consideration to a two-board system. Frankly, even the most capable, dedicated board member finds it impossible to do justice to the total assignment." Numerous studies have shown that we need this. The fear has been expressed that a separate board for public education might usurp the powers of local boards. There is no reason to be concerned about such a policy—possibility—however, since the powers granted the state board would be almost identical to those now granted, and what we have just done is to guarantee the control by the local board at the local level. Indeed, the committee has actually deleted the word "control" from the powers and granted—now granted the board, so that the new section reads: "exercise general supervision over the public school system." It would be difficult to argue that this grants any additional powers to the state board at the expense of local school boards. Under existing law, vocational—let me bring up this question about where's the vocational-technical schools going to go. This has caused a lot of concern. I want to make sure, at this time, for the record, the feeling of the committee and cite a number of other things. First of all, the committee wants it categorically stated that their feeling is that they want the vo-tech schools to

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CONCLUDING COMMENTS

If the court ruling is correct, then the People of Montana – the sovereign political power of the State of Montana, must be given the power to elect the members of the Board of Public Education so that the most basic and foundational principle of representative government – that all power is granted by those governed – is manifested.

Steve Maloy, Ex. Sec., BOPE:

- *“BOPE ought not have to consider costs when determining what education should look like in Montana.”* Public comment on SB 67, Senate Education Committee)(Contrast this comment to those made at the constitutional convention.)
- *“BOPE has quasi-legislative functions.”* Presentation before combined House/Senate Education Committees.

Senator Bob Hawks:

- In essence, the constitution has created a fourth branch of government. (during debate on SB 67 on Senate floor

It would be preferable to have the Montana Constitution followed – wherein the control of local schools would be the jurisdiction of the Local School Boards, and where BOPE had “general supervision” as specified by the Constitutional Convention.

However, since the 1992 District Court ruling, that is not the case. That District Court opined that the BOPE has “constitutional rule-making authority”. It’s ruling in effect established:

- **that the BOPE is a fourth branch of government,**
- **that the BOPE has legislative powers for rule-making, and**
- **that BOPE rules are superior to statutes enacted by this Legislature.**

Thus:

- **in order to comply with Article II, Section 1, “*All political power is vested in and derived from the people. All government of right originates with the people, is founded upon their will only...*”, this Article being the most foundational principle of a representative form of government;**
- **in order to comply with Article II, Section 2, Self Government;**
- **in order to comply with Article III, Section 1, Separation of Powers; and**
- **in order to comply with Article X, Section 8, School District Trustees, that “*The supervision and control of schools in each district shall be vested in a board of trustees to be elected as provided by law*”;**

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It is, therefore, incumbent on this legislature to assure:

- 1. that the people's rights are protected;**
- 2. that the people's right to elect their representatives are protected;**
- 3. that the powers granted by the people to those who administer the government be limited; and**
- 4. that those powers thus granted be further protected with proper checks and balances.**

And finally, in order to provide for all of the above, it is necessary that the Legislature pass SB 81 to offer to the people of Montana, a proposed amendment to the Montana Constitution, to elect the members of the Board of Public Education.

The people of Montana may then decide for themselves whether or not to elect the members of the Board of Public Education.